Supreme Court, U.S.
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No. 02-1794

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MANUEL FLORES-MONTANO,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband; *i.e.,* is removing and disassembling a vehicle gas tank a "routine search" at the border that does not require reasonable suspicion?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL; www.nacdl.org) is the preeminent bar organization advancing the mission of America's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has nearly 11,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization on its House of Delegates. The International Bar Association recognizes NACDL as an affiliate organization.

NACDL promotes study and research in the field of criminal law. In furtherance of its objectives over the past 15 years, NACDL annually files approximately ten amicus briefs with this Court on criminal justice and personal privacy issues.

The parties have consented to the filing of this Amicus brief on behalf of the Respondent, and the letters of consent should already be filed with the Clerk.

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for a party authored any part of this brief. No person or entity other than Amicus made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6, Amicus is a nonprofit corporation. It has no parent corporation, it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

SUMMARY OF THE ARGUMENT

This case concerns the breadth of the power of the Government to conduct suspicionless border searches of vehicles, including dismantling parts of them, without reasonable suspicion. The Government relies on the common law and customs statutes passed at the time of the framing of the Fourth Amendment. The statutes provide no clear answer, and the common law strongly suggests that a search of this intensity without cause was unreasonable. If the Court finds the common law answer unclear, the Court must then turn to a reasonableness inquiry, which is informed by the changing of time and technology. From either perspective, Respondent should prevail.

While the framers did not anticipate automobiles, Amicus submits that the common law at the time of the framing of the Fourth Amendment would not support such a search. Searches of this nature of ships were loathed by the colonists. The seizing of John Hancock's sloop *Liberty* led to a riot in Boston, and colonists were aware of, and despised, similar searches in all the colonies. In that same time period, customs officers were ordered off ships at gunpoint and one was harpooned for exceeding their common law authority by searching for dutiable goods below deck before the cargo reached the docks. The instructions from England were that force was only permitted to meet resistance to the search for dutiable goods, not to break and enter private areas.

The original customs acts of 1789 and 1790 spoke only to searching for goods, not breaking to retrieve them. Nothing in the history of those acts or the common law

supports the breadth of search sought by the Government in this case.

This Court's modern case law on border searches has distinguished between "routine" and "non-routine" searches. The intensity of the search determines whether it is "routine." The Government argues that, since a mere vehicle is involved, virtually anything it wants to do to it is routine. It relies on the slimmest of anecdotes to state that removal of gas tanks is "simple and easy." It is not – it is an involved process varying greatly by the construction of the vehicle involved, and it is potentially dangerous because gasoline fumes are always present and they create a danger of fire. Some cars have to have new parts installed when disassembled. At least one requires also disassembling the braking system of the car and lowering the rear axle. Finally, the CDC notes that gasoline is likely carcinogenic because of the 150 chemicals added to gasoline, and those working around gasoline should wear gloves and avoid breathing the vapors.

Gathering reasonable suspicion at the border today does not require an intensive search. A customs officer can tap on the gas tank to hear if it sounds like it contains fuel or solid objects, and dogs can sniff vehicles as they pass through customs. They did that here.

Technological advances, moreover, make it possible to search a gas tank for contraband without removing it. For years, the Government has used vehicle x-rays, density meters, and fiber optic scopes that are far less intrusive than removing a gas tank, something that the Government concedes produced nothing 7.5% of the time apparently even with reasonable suspicion.

By tapping the tank or looking inside with their own technological devices, they can insure that gas tank removals are founded on reasonable suspicion. When basic technology has overtaken the knowledge of the framers, we should look to that technology for the answer, and that answer here is that manual removal of a gas tank to search it without reasonable suspicion is unreasonable.

The Court has never foreclosed looking to the availability of less intrusive measures as an element of reasonableness. This is a case where the intensity of the search can readily and more easily be ameliorated by a less intrusive measure that actually saves the government time, expense, and manpower and protects the innocent motorist from unwarranted delays in crossing the border where an officer decides to search a gas tank without suspicion.

ARGUMENT

THE SEARCH OF A VEHICLE GAS TANK BY REMOVING IT IS NOT A "ROUTINE BORDER SEARCH" WHICH CAN OCCUR WITHOUT REASONABLE SUSPICION.

A. Introduction

The parties have more than adequately addressed the justification for the border search exception in the context of the facts of this case, so Amicus will not belabor it here. The crux of this case is: whether removing a gas tank from

an automobile without reasonable suspicion[2] there is contraband inside is a "routine border search" or otherwise "reasonable" under *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985); *see United States v. Ramsey*, 431 U.S. 606, 615 (1977). If it is not a "routine border search," then reasonable suspicion is required. *Montoya de Hernandez*, 473 U.S. at 541.

No one doubts the power of the Government to search (including dog sniff) at the border of luggage,[3] shipping containers, mail,[4] trunks of cars,[5] backs of trucks, and cargo of ships[6] to look for dutiable goods, contraband, or illegal aliens "to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Ramsey*, 431 U.S. at 620.

Montoya de Hernandez found the detention of an alimentary canal drug smuggler for the duration of necessary body functions was not a routine border search, but it was reasonable and conducted with reasonable suspicion, and the delay and obvious discomfort she endured was,

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[2] The Government has expressly waived reliance on reasonable suspicion in the District Court, the Court of Appeals, and here, and it is bound by that now.

From the facts, however, it is obvious that there was reasonable suspicion by the fact the gas tank sounded solid and a drug dog alerted to the vehicle. Br.U.S. at 3.

[3] *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971).

[4] *Ramsey, supra.*

[5] *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (*dicta*); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

[6] *Boyd v. United States*, 116 U.S. 616, 623 (1886).

however, caused by her own actions in choosing to secrete drugs within her body. *Id.* at 544.

What is a "routine border search"? The answer is not always obvious, but the Government's historical power did not go as far as the Government suggests. Indeed, history indicates that this breadth of suspicionless border search was prohibited. The distinction between routine and non-routine searches is a balance struck between the needs of law enforcement and privacy. The Government suggests that it "must have wide latitude to remove and, if necessary, to disassemble a vehicle's gas tank to deter and detect illegal smuggling into the country." Br.U.S. at 16. But, this is precisely what the border search exception already provides, since the Government has always had the power to make routine searches with no suspicion, and more intensive, non-routine searches with reasonable suspicion. The Government's language suggests some sort of exigency, but the border search exception is "not based on the doctrine of 'exigent circumstances' at all." *Ramsey*, 431 U.S. at 621.

The Government cannot show that disassembling a vehicle is "routine" under either an historical view or a reasonableness analysis. An analysis of both may ultimately be required in this case.

B. The Common Law and historical basis for customs searches

1. Application of the Common Law and "Reasonableness."

In *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999), the Court said:

> In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. *See Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621 (1991). Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995).

See also Kyllo v. United States, 533 U.S. 27, 40 (2001) ("we must take the long view, from the original meaning of the Fourth Amendment forward"). In *Wilson*, 514 U.S. at 431, the Court said:

> In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. *See California v. Hodari D.*, 499 J.S. 621, 624 (1991); *United States v. Watson*, 423 U.S. 411, 418-420 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment.

The Court has also said that it has not frozen into law the Fourth Amendment as it existed in 1791. *Payton v.*

New York, 445 U.S. 573, 591 n. 3 (1980), quoted in *Steagald v. United States*, 451 U.S. 204, 218 n. 10 (1981), and *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). And, where there is no common law guidance, "reasonableness" must be read in light of changing circumstances of modern times. "Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry." *Garner*, 471 U.S. at 13 (common law sanctioned killing fleeing nonviolent felons, but "changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied"; *id.* at 15).

When technology overtakes the common law, as will be seen has happened here, *Garner* requires us to look to technology for the answer. Here, technology obviates the need for suspicionless gas tank removal because the government can get its reasonable suspicion with minimal effort.

2. Nothing in the Common Law sanctions this kind of "breaking" or intensive search without suspicion.

At common law, this kind of "breaking" of property for a border search was not sanctioned.

As Respondent notes, Cuddihy states that colonists treated their ships as well as houses as their castles. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, at 362-63 & 1215 (1990). The infamous search and seizure of John Hancock's sloop *Liberty* in May 1768 engendered great resentment in the colonies, but it was obvious that it was the culmination

of a building resentment over unrestrained searches and seizures and breakings of containers and ships by customs officials and naval officers up and down the colonial coastline. *Id.* at 1216-19.[7] One month earlier, a customs officer went below deck of Hancock's *Lydia*, and Hancock had him brought up at gunpoint telling him that, while they could assess the cargo on the dock,[8] customs officers had no business searching his ship. After the seizure of the *Liberty*, a "small riot" ensued, and one customs officer had his boat burned and others were chased off by a band of Hancock supporters. Finally, the *Liberty* was returned to Hancock. The story and importance of the seizure of the *Liberty* was only touched on in passing by CUDDIHY, but it is discussed at length in 2 LEGAL PAPERS OF JOHN ADAMS 173-210 (Atheneum 1965) because John Adams represented Hancock in the suit over the seizure of the *Liberty*. The gist of Adams's account is that the law at the time required customs officers to have suspicion to search. Also, the infamous writs of assistance were intertwined with customs searches; JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 30 (1966); and, Amicus

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[7] "A Pennsylvanian lamented that naval officers and degenerated into 'pimping tidewaiters' who scoured every harbor and creek in the colonies with armed force, detained everything afloat from fishing smacks to wood boats, tumbled their cargoes, and inspected even their ballast." CUDDIHY at 1217.

CUDDIHY also writes of customs officer Henry Panton harpooned in the jugular by outraged crewmen when his customs search apparently turned pretextual. *Id.* at 1218-19.

Interestingly, CUDDIHY also writes of customs officers searching for flammable goods and gunpowder with an open flame. *Id.* at 1216. *See infra.*

[8] *Compare id.* at 1216.

submits, that indicates a common law requirement of probable cause or at least reasonable suspicion. At the minimum, reasonableness was always required. Harris J. Yale, Note, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 HOFSTRA L. REV. 733, 748 n. 122 (1983). As Respondent notes in his brief, general instructions from England were "to do no more than" enter upon a ship and diligently search, and force was only permitted to meet resistence. Resp.Br., Part C.4, quoting 4 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 164 (1938).

3. Nothing in the first customs acts sanctions this kind of breaking.

In *Ramsey*, 431 U.S. at 616-17 n.12, the Court discussed Act of July 31, 1789, 1 Stat. 29, adopted at the time of the adoption of the Fourth Amendment, and it noted that § 23 of the Act granted Customs agents power to open packages in the presence of "two or more reputable merchants." Section 24 of the Act noted that Customs officers had the power to board vessels and search for goods subject to duty, "but if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only)."

In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Court analyzed the successor statute, Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164, quoted in Resp.Br. Part C.2., which became 19 U.S.C. § 1581(a) which permits customs officers to board any vessel or

vehicle "and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." Contextually, "compel compliance" refers to "hail and stop." The question is what does "search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board" encompass? Section 31 talks about sealing containers for later inspection, but not any breaking. Respondent notes that 19 U.S.C. § 1461 "contemplates opening a 'closed vehicle' with a key." Resp.Br., Part C.2. n.20. This common law history militates against granting the Government a general power to break and disassemble at the border.

Nothing in the history of the Fourth Amendment, the customs statutes, or the Common Law supports the Government's position that such an intrusive breaking as here can occur without reasonable suspicion. Section 48 of the 1790 Act used the phrase "reason to suspect" dutiable goods were being concealed as grounds to search a vessel, and "reason to suspect" today means "probable cause." Resp.Br. Part C.2., citing *Wyoming v. Houghton,* 526 U.S. at 300, and *Vernonia,* 515 U.S. at 670-71 (O'CONNOR, J., dissenting) and noting Justice O'CONNOR "cit[ed] the identical language in the Collection Act of July 31, 1789, § 24, 1 Stat. at 43[ ]. Thus, it appears that the first Congress required probable cause for the most intrusive search it authorized, a higher standard than the Court of Appeals applied here," or any court of appeals in any case involving gas tank removals.

C. Routine v. Non-Routine and Fourth Amendment Reasonableness

1. Introduction.

As noted above, Fourth Amendment reasonableness is always an issue, even in a border search. *Montoya de Hernandez*, 473 U.S. at 538. Reasonableness is the "touchstone"[9] or "fundamental inquiry"[10] in Fourth Amendment cases. "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Robinette v. Ohio*, 519 U.S. 33, 39 (1996); *accord Delaware v. Prouse*, 440 U.S. 648, 655 (1979) (reasonableness must be viewed objectively lest privacy be "subject to the discretion of the officer in the field").

Since any reliance on reasonable suspicion has been expressly disavowed in this case, this search was not reasonable under all the circumstances, in light of the lack of reasonable suspicion which must be taken as a given.

2. Gas Tank Searches Are Not a Minimal Intrusion and, Therefore, Not "Routine" – The Work Is Inherently Dangerous If Not Done Safely or Correctly.

The Government asserts, without any contemporary reading or factual investigation, that "[t]he procedure involved in a gas tank search also involves no extraordinary intrusion on either the individual or his vehicle. The

[9] *Robinette v. Ohio*, 519 U.S. 33, 39 (1996), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

[10] *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Griffin v. Wisconsin*, 483 U.S. 873 (1987).

disassembly and removal of a gas tank is a relatively easy and straightforward procedure that may be readily performed by automobile mechanics." Br.U.S. at 25. The Government presents the Court with four websites with personal anecdotes in "chat-type" postings by shadetree mechanics that removal of particular gas tanks is "relatively easy and straightforward." *Id.* at 25-26 n. 5. The Government completely overlooks the host of reported cases involving gasoline fires in garages occurring under similar circumstances.[11] And, if its contract mechanic is responsible for a gasoline fire, who pays? Does the Government's discretionary function exemption to the Federal

[11] The number is too great to cite, and they have been around as long as there have been automobiles. Just a few give the flavor: *see, e.g., Glenns Falls Ins. Co. v. Danville Motors, Inc.*, 333 F.2d 187 (6th Cir. 1964) (garage gasoline fire burned down apartment building); *Charter Oak Fire Ins. Co. v. Trio Realty Co.*, 2002 WL 123506 (S.D.N.Y. 2002) (gasoline spilled to floor and was ignited by pilot light of hot water heater); *Meridian Mut. Ins. Co. v. Parkey*, 769 N.E.2d 1179 (Ind. App. 2002) (fumes ignited while gas was being syphoned from tank); *Stephens v. State*, 214 Ga. App. 183, 447 S.E.2d 26 (1994) (arson utilizing gasoline vapor from car); *Indiana Consol. Ins. Co. v. Mathew*, 402 N.E.2d 1000 (Ind. App. 1980) (just filled lawn mower caught fire in garage after being started); *Starks Food Markets v. El Dorado Refining Co.*, 156 Kan. 577, 134 P.2d 1102 (1943) (gas tank being filled from tanker truck caught fire); *Baker v. Employers' Fire Ins. Co.*, 201 So.2d 349 (La. App. 2d Cir. 1967) (gasoline fire on car on front-end alignment rack; gas tank exploded when fire department tried to move car out of garage in an attempt to save building).

Remarkably, something as benign and as omnipresent as a garage mechanic's "creeper," a device for a mechanic to roll under a car on his or her back to do repairs or inspect without lifting the car, caused a spark that ignited gasoline fumes and destroyed a state owned garage and the adjoining business and it contents in 1948. *State ex rel. Cox v. Sims*, 128 W.Va. 482, 77 S.E.2d 151 (1953). Creepers have metal wheels, the floor was concrete, and that combination created a spark source.

Tort Claims Act protect it from liability, or must the vehicle owner look to his or her own insurance, *if* the owner happens to have coverage for such an event?

Amicus invites the Court to read the three Internet postings proffered by the Government that are still online (as of January 10, 2004, one was missing[12]): the newest car referred to in the first citation involves a 1974 Porsche 914, but the "easy task" has two screens of directions[13]; the third reference was to removing the gas tank in a 1959 Ford; and the last, www.1inamillioncars.com, referred to a 1965 Ford that the poster was also trying to sell. The Government provided nary a word from a professional mechanic. Professional mechanics, as will be seen, require far more.

Amicus's counsel went to a Barnes & Noble store for a couple of hours in early January 2004, and stood in the section on automobile repair perusing a few dozen Chilton Repair Manuals. Chilton is the ultimate publisher of automobile repair manuals, and they have published manuals for decades for virtually all basic cars sold in America. All the Chilton repair manuals have one of two warnings about removing fuel tanks. The predominant, more current ones state, with bold face and italic in the original:

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[12] The second citation, within www.c3sharktank.com, came up as "404 Page Not Found," and a search of the website could not locate the reference either.

[13] The end of the directions also state: "Finally, make sure you do this in an area free from sparks or other source of ignition, as you will be working with an open tank of gasoline. To be safe, it is also not a bad idea to disconnect the battery." The Government left those critical facts out in describing it as a "relatively easy and straightforward procedure."

> **Warning:** *Gasoline is extremely flammable so take extra precautions when you work on any part of the fuel system. Don't smoke or allow open flames or bare light bulbs near the work area, and don't work in a garage where a natural gas-type appliance (such as a water heater or a clothes dryer) with a pilot light is present. Since gasoline is carcinogenic, wear latex gloves when there's a possibility of being exposed to fuel, and, if you spill any fuel on your skin, rinse it off immediately with soap and water. Mop up any spills immediately and do not store fuel-soaked rags where they could ignite. The fuel system is under constant pressure, so, if any fuel lines are to be disconnected, the fuel pressure in the system must be relieved first. When you perform any work on the fuel system, wear safety glasses and have a Class B type fire extinguisher on hand.*

Chilton's earlier warnings state:

> **Caution:** Observe all applicable safety precautions when working around fuel. Whenever servicing the fuel system, always work in a well-ventilated area. Do not allow fuel spray or vapors to come in contact with a spark or open flame. Keep a dry chemical fire extinguisher near the work area. Always keep fuel in a container specifically designed for fuel storage; also, properly seal the fuel containers to avoid the possibility of fire or explosion.[14]

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[14] *See, e.g.*, Chilton, General Motors, Chevy Mid-Size Cars, 1964-88 Repair Manual (1994), Ch. 5, p. 52-54 (repeating the warning *five* times in three pages):

(Continued on following page)

The Chilton series notes that most automobiles built since the late 1990's have plastic gas tanks that must be replaced if even *slightly* damaged.[15] Some require that new seals be installed whenever the parts of the tank are removed.[16] Some state that gasoline spillage will necessarily

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→ Be sure to store the fuel tank in a cool dry area out of direct sunlight. Keep any source of flame away from the tank[.] [E]ven though it has been drained of most fuel, there is likely an [*sic*] large amount of flammable vapors still stored in the gas tank.

[15] *See, e.g.*, Chilton, VW/Audi, Passat 1998-01, A4 1996-01 Repair Manual (2001), Ch. 4, §§ 1 & 6 (these fuel tanks are not repairable – they must be replaced if even slightly damaged); Chilton, Chrysler LHS, etc., 1998-2001 (2002), Ch. 4, § 6(1) (same).

[16] Chilton, General Motors DeVille/Fleetwood/El Dorado/Seville 1990-98 Repair Manual (2000), Ch. 5, p. 9, step 9.

This begs the question of whether the Government's contract mechanics bring the parts or must send for them when they find out that parts also need to be replaced, thereby unnecessarily extending the stop even longer. Since the Government admits that 348 gas tank searches in Southern California during the relevant time period were fruitless (because they rely on no suspicion at all), Br.U.S. at 31, the search and seizure is extended by the time it takes to secure the parts to correctly complete the repairs, depending upon whether the Government chooses to do the repairs completely or send the motorist on his or her way with a defective fuel system that will leak, only to later cause a fire away from the border.

With 4,619 drug seizures from gas tanks, Br.U.S. at 16, that gives the Government a 92.5% success ratio *when they presumably have reasonable suspicion*. If the Government was following the appellate court decisions requiring reasonable suspicion, then 7.5% of the time the reasonable suspicion was wrong. In percentages, it sounds effective, but, in raw numbers, the occupants of 348 vehicles, potentially a thousand people, were severely inconvenienced.

Here, the Government wants it all, to be able to conduct these searches even without reasonable suspicion, and that would greatly increase the numbers of innocents subjected to unreasonable border searches.

occur and safety precautions must be taken.[17] All state that the negative battery terminal must be disconnected to avoid an electrical spark that would start a fire, but only one warned to write down the car radio security code so the audio system, which could be extremely expensive, will work when the battery is reconnected.[18]

Most notably, we find that removal of the gas tank in a 1990-99 Volkswagen is anything but easy, and it involves removal and replacement of other vital parts of the car. Chilton states that the negative battery cable should be disconnected, the mechanic must be grounded to the car to avoid sparks, the back seat must be removed to get access to some of the tank bolts, the inner fender wall must be removed to disconnect the filler line, *the rear axle must be disconnected and lowered, including bleeding and disconnecting the hydraulic brake lines,* and the muffler disconnected.[19] That is anything but simple.

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[17] *See, e.g.*, Chilton, Saturn Coupes/Sedans/Wagons 1991-98 Repair Manual (1998), Ch. 5, p. 21 (18 steps).

[18] Chilton, Honda Civic/Del Sol 1996-00 Repair Manual (2001), Ch. 5, p. 11, step 1.

The radios of nearly all cars built within the last several years have built-in anti-theft programs. When the radio is reinstalled or the power disconnected and reconnected, the mechanic has to press the six channel keys in a certain sequence to activate the radio. An incorrect code can permanently disable the electronics in the radio to make it not worth stealing.

[19] Chilton, Volkswagen, Golf/Jetta/Cabriolet, 1990-99 Repair Manual (2000), Ch. 5, p. 12.

And, if one is cleaning a gas tank, Chilton recommends a professional mechanic must do the work.[20]

Even a nearly empty gas tank has gas fumes. Gas fumes explode. Therefore, gas tanks can explode during repairs. This is common sense.

On its website, Universal Underwriters, a fire insurer has an online newsletter *The Specialist* with an article on "How to avoid fire losses while servicing gasoline tanks." They write: "Service work on automotive gasoline tanks can result in significant property damage and employee injury if proper procedures and equipment aren't used. To the right are examples of such losses.[21] Don't let them happen at your dealership." It adds: "Note: only skilled employees who have been trained to safely work on or service gasoline tanks should be allowed to perform such work."[22] Just to be sure, they say it again: "The work should only be performed by employees with sufficient skill and training to carry out the operation in a safe manner."[23]

So, the Government wants the Court to believe that it is an "easy task" that can be done by anybody, but it is

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[20] Chilton, Chrysler LHS, etc., *supra*, § 6(2): "Cleaning the fuel tank (due to fuel contamination) should be performed by a professional with the proper training to carry out this critical and potentially dangerous work. Even after cleaning and flushing, explosive fumes may remain inside the fuel tank."

[21] The site lists examples of just five major garage fires from dropping a shop light which ignited fumes (one causing $729,000 damage) or fumes exploding from a pilot light. *See* the following note.

[22] http://www.universalunderwriters.com/uug/maintenance.nsf/0/F6A0CB83E821523F86256DD3006D983D?opendocument&changemenu=no.

[23] *Id.*

apparently oblivious to the obvious risks. To anyone who has ever spent any time in a garage, working on a gas tank is neither easy nor safe. Those of us who worked in fleet garages in college and law school are quite familiar with the risks of working on gas tanks. All of the Courts of Appeals to have viewed this issue, cited in Respondent's brief, have come to this realistic conclusion, and this Court should, too. Common sense should not take a back seat in constitutional adjudication.

The precautions are significant, because, once fumes ignite, there likely will be an explosion. If one is lucky, maybe it will just be a fire that can be put out with a fire extinguisher, which all the Chilton manuals, not to mention OSHA and all local fire safety codes, require be present. Add to this danger of fire and explosion the fact that the same Government prosecuting this case strongly suspects that gasoline is carcinogenic if it comes into contact with the skin or is inhaled[24] and requires that underground metal gasoline storage tanks are environmental hazards that must be removed and ground contamination cleaned up at great expense to the owners.[25] It is also common knowledge that several states, the first being California, require that gasoline pumps have devices

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[24] Because gasoline includes 150 different chemicals, overexposure to gasoline has been linked to breast cancer in men, and it can cause harmful effects to the central nervous system according to the Center for Disease Control. The jury is still out on the extent of the cancer risk, and the Environmental Protection Agency is still studying it. http://www.atsdr.cdc.gov/tfacts72.html.

[25] The Resource Conservation and Recovery Act of 1976, as amended (RCRA § 9004), 42 U.S.C. § 6991c, allows the U.S. Environmental Protection Agency to approve state underground storage tank programs to operate in the state in lieu of the federal underground storage tank program.

to reclaim gasoline fumes generated by the process of pumping and return them to the underground tank. Why? Gasoline fumes add to pollution.

Some gas tank parts must be replaced if removed for any reason; some cars require disassembling the brakes, bleeding the brake fluid out of a car, and dropping the rear axle, and all that *after* removing the rear seat to get to an access panel under it and removing the inner fender well to get to the filler line. How can it rationally be stated that this is "routine"? What if the contract mechanic fails to do his or her job correctly in reassembling the car or does not note that a particular car is one of those needing replacement parts? What if a $1,000 audio system self-destructs because the mechanic failed to note the security code? Who is responsible?

The best the Government can do is rely on four "shadetree mechanics" (not professional or certified mechanics) working at home on 30+ year old cars found from Google searches for its anecdotal, not professionally-guided, sources. Maybe it is easy on 30 year old cars where the owner is the mechanic cutting corners, but it is not easy today – it is inherently dangerous to the safety and health of the persons doing the work, including the Customs agents standing around watching, waiting for the gas tank to be dropped out so they can get right to it to hammer on the gas tank, as happened here. Br.U.S. at 3: "Inspector Pesayco hammered off bondo . . . from the top of the gas tank. That process took an additional 5 to 10 minutes." If Inspector Pesayco was using metal tools or was using metal tools on a metal tank,[26] there was a risk of

[26] This car was old enough that the tank would be metal.

fire or explosion. Thus, in their zeal to open the gas tank, the Customs agents put themselves, the contract mechanic, the garage of the Government, and the property of the target of the search and seizure all at unnecessary risk of fire while ferreting out crime.[27]

3. Technological Advances Make It Far Easier to Determine Reasonable Suspicion of Smuggling, and This Must Be Factored Into a Reasonableness Analysis.

Kyllo brought this Court face-to-face with a technological advance, thermal imaging, that made it possible to intrude into the expectation of privacy of a house. As this Court noted in *Garner,* 471 U.S. at 15, "changes in the legal and technological context" can distort common law meanings "almost beyond recognition when literally applied." Elementary technological changes already employed by the Government at the borders enable it to conduct intensive and quite revealing searches of vehicles without even touching them. Customs uses "mobile truck x-ray, buster density meter[s], and fiber optic scope[s]" to determine what is hidden. *US Customs Today*, January 2001,

[27] Which brings to mind Justice JACKSON's comment in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

http://www.cbp.gov/xp/CustomsToday/2001/January/custoday_hrm.xml. In June 1999, the Associated Press ran a story that was picked up nationwide: "High-Tech Detection Boosts War On Drugs."[28] The article speaks of a truck x-ray that can find drugs and illegal aliens in hidden compartments,[29] density meters[30] that can tell whether the wall of a compartment or a truck body has something hidden in it[31] (which is the subject of National Institute of Justice, *Guide to the Technologies of Concealed Weapon and Contraband Imaging and Detection,* NIJ Guide 602-00 (February 2001)[32]), and fiber optic scopes that can be inserted through the gas filler line to determine whether the gas tank has something other than gas in it.

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[28] http://www.mapinc.org/drugnews/v99.n592.a08.html and http://www.hemp.net/news/9906/14/high_tech_customs.shtml. One newspaper's version of this article was cited in Christopher E. Smith & Madhavi McCall, *Constitutional Rights and Technological Innovations in Criminal Justice*, 27 S. ILL. U. L. J. 103, 104 n. 9 (2002).

See http://www.msnbc.msn.com/Default.aspx?id=3070685&p1=0 (showing a picture of a dog sniffing a car while another Customs inspector uses a density meter on the left rear quarter panel, apparently from September 2003).

[29] It has even been on the Discovery Channel that trains are x-rayed at the border, too.

[30] One seller of portable density meters is Mettler Toledo, www.mt.com.

The White House Office of Drug Control Policy gives grants to police departments to buy density meters. *See, e.g.*, http://www.odessapd.com/k9.htm.

[31] Density meters have even made into movie scripts: http://www.stationfive.com/movies/Scripts/Mission_Impossible_2.txt.

[32] http://www.ncjrs.org/pdffiles1/nij/184432.pdf. Chapter 7, at 33-50, discusses the technology of density meters.

Density meters[33] and fiber optic scopes[34] have figured in numerous drug searches, only a few of which have been reported. And they can actually enhance privacy interests of the targets of searches and seizures, assuming the officer has justification for using one, by preventing needless destruction of property where the officer's suspicions are aroused. *See, e.g, United States v. Workcuff,* 250 F.Supp.2d 1160, 1181 (W.D.Mo. 2003) (density meter used on walls to avoid needless destruction of property during execution of a search warrant).

The Government had these tools available to it at this border crossing, but it seeks a vastly broader rule: one that permits an invasive search of a car with no pretense of suspicion, so invasive it would not be permitted even during an inventory search or a *Terry/Long* search of a car for weapons, all places where the Government also has a

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[33] *See, e.g., United States v. Hernandez*, 314 F.3d 430, 432 (9th Cir. 2002) (used on door of minivan), *amended and superseded*, 322 F.3d 592, 595 (9th Cir. 2003), *petition for cert. filed* (June 3, 2003; No. 02-11098); *State v. Garcia*, 2003 WL 22247450, *3 (Tenn. Oct. 1, 2003); *People v. Moya*, 2002 WL 31031780, *1, *2 n. 1 (Cal.App. 4th Dist. 2002) (unreported) (used by at random on cars in a parking lot near the Mexican border; constitutional issue of use of density meter not decided because of independent dog alert).

Counsel for Amicus can state as an officer of the Court that he reads police reports at least once a week where Arkansas State Police officers, particularly along I-40 near the Oklahoma border and around Little Rock, in a notoriously poor state, use density meters on vehicles when their suspicions are aroused. If the meter gives them more suspicion, they call for a drug dog.

[34] The following cases all involve searching gas tanks with fiber optic scopes: *United States v. Alcantar*, 271 F.3d 731, 735 (8th Cir. 2001); *United States v. Sanchez-Pena*, 2001 WL 685539, *1 (W.D. Tex. 2001); *United States v. Garcia*, 52 F.Supp.2d 1239, 1249 (D.Kan. 1999).

weighty interest. When basic technology overtakes the knowledge of the framers, we should look to that technology for the answer. That answer here is that manual removal of a gas tank without reasonable suspicion is unreasonable under the Fourth Amendment.

4. The Ready Availability of Far Less Intrusive Measures Makes This Search Unreasonable.

Amicus recognizes that this Court has held that the availability of "reasonable alternatives" or "less intrusive measures" is usually for law enforcement to decide and not for courts to second guess. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990) ("But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." (dealing with how sobriety checkpoints will be established)). But, in *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983), the Court made it clear that it did not foreclose the use of "less intrusive measures" in assessing reasonableness of a particular search:

> The reasonableness of any particular governmental activity *does not necessarily or invariably turn* on the existence of alternative "less intrusive" means. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), for example, we upheld the search of the trunk of a car to find a revolver suspected of being there. We rejected the contention that the public could equally well have been protected by the posting of a guard over the automobile. In language equally applicable to this case, we held, "[t]he fact that the protection of the public might, in the abstract, have been

> accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*, at 447. *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n. 12 (1976). We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved. (emphasis added)

This case involves something much more than application of a less intrusive measure as to where and how a DWI roadblock will be established or whether a package will be inventoried in storage. Rather, it involves a far more serious intrusion into the liberty and freedom of movement of a motorist crossing the border while officers spend an hour or more taking the gas tank out of their car on a mere whim, if they so choose. This is a situation where the intensity of the search can readily and more easily be ameliorated by a readily available less intrusive measure that actually saves the government time, expense, and valuable manpower and protects the innocent motorist from unwarranted delays and intrusive searches in crossing the border when an officer decides to search a gas tank without suspicion.

Thus, the Court should look to Customs' own common use of its basic technology at the border which should be used to determine reasonable suspicion without granting the Government the wholesale right to disassemble any car it wants for any reason whatsoever, and that is exactly

the power the Government seeks. In the context of this case, the failure to use a common and less intrusive measure cuts to the heart of reasonableness of a search as a whole, and this is just the exception that *Lafayette* was looking to. Therefore, when balancing individual interests against governmental need, the scale tips decidedly toward individual interests because the magnitude of invasion of privacy and the greater length of detention of the individual. When this type of search occurs, reasonableness dictates that it be based on something more than merely presenting oneself at the border and the whim of the particular officer at that day and time.

Indeed, merely tapping on a gas tank with one's knuckle may provide reasonable suspicion, as it did here, but the Government wants its proposed suspicionless search rule, and nothing else. The Fourth Amendment, however, requires more from our Government, and it always has, from the seizure of John Hancock's *Liberty* to the Customs statutes of 1789 and 1790 to today.

Therefore, this search is clearly "non-routine" and it must be subject to the reasonable suspicion standard.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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